

TO: Transportation Commissioners

FROM: Jeff Doyle, Director, Public-Private Partnerships,
Washington State Department of Transportation

DATE: Tuesday, March 14, 2006

SUBJECT: Conflict of Interest provisions in (draft) Transportation Innovative
Partnership Program administrative rules

Now that the Legislature has adjourned and we know that the TIP program will remain essentially unchanged from current law, it's time to begin the formal rulemaking process for adopting the TIPP rules. However, during the past few weeks, I have discovered a potential problem with the Conflict of Interest (COI) provisions contained in the draft rules. I will try to summarize this complicated issue below, and then suggest an approach.

The problem with the current Conflict of Interest rules

The draft rules attempt to preclude private sector partners from participating in a TIP project if the private partner is

“...unable or potentially unable to render impartial assistance or advice to the state; or is unable or potentially unable to carry out its contractual obligations in an objective manner; or the private partner's ability to work in a 'best for project' manner is in any way affected, diminished or impeded.”

The above provision seems to relate only to the private partner's ability to provide unbiased services *to the state itself*; it assumes that the only potential conflict that the state is concerned about is where the state hires a private firm to act on its behalf, as the state's agent or consultant. The Conflict of Interest provision does *not* adequately address the situation where a private firm obtains information or knowledge about a project by virtue of the firm's past work for the state on a project, and then subsequently joins a private venture team to bid on that same project scheduled for development under the TIP program.

There are other COI provisions in the draft rules besides the one quoted above, but in the opinion of Nossaman Guthner (our special counsel for select public-private partnership matters) these other provisions don't adequately cover the potential problem of private firms “switching teams” once they have acquired inside knowledge and information.

The other provisions in the draft rules related to Conflicts of Interest (such as COI by State Officials; Improper Conduct by Proposers; and Appearance of Fairness) appear adequate to protect the public interest. I am not aware of any changes required to these provisions.

Suggested approach to address the Conflict of Interest issue

Oregon has similarly struggled in their attempts to regulate Conflicts of Interest through rulemaking. Oregon's Commission ultimately decided to outline general types of conflicts that are prohibited, and to require the Oregon DOT to issue guidelines and policies that spell out the more specific types of situations that would constitute a Conflict of Interest. Many other states also use this approach; some states make no mention at all of Conflicts of Interest in their administrative rules. I will enclose a copy of ODOT's Conflict of Interest Guidelines as a reference point.

I recommend the approach taken by Oregon: slight revisions to our draft rules that would capture the nature of the conflicts to be avoided, and direct WSDOT to develop more detailed COI guidelines to be issued concurrent with a project RFP or RFQ.

If you decide to take this approach, you could either revise the COI draft rule now, before starting the formal rulemaking process; or you could simply make this change later, at the same time you consider any other changes resulting from comments received under the rulemaking process.

I have attached a revised draft of the COI provision, if you wish to make a change at this time. Otherwise, you could begin the rulemaking process now while continuing further work on this issue.